Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term 2004

PHONOMETRICS, INC. and
JOHN P. SUTTON,

Petitioners,

v.

ITT SHERATON CORP.,

Respondent.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a district court and a court of appeals indicate what excess costs, expenses and attorney fees were incurred as a result of multiplying the proceedings unreasonably and vexatiously under 28 U.S.C. §1927?

CORPORATE DISCLOSURE STATEMENT

Petitioner Phonometrics, Inc. is a Florida corporation. There are no parent corporations. No publicly held company owns 10% of Phonometrics, Inc.

Petitioner Sutton is a California attorney not related to any corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Phonometrics, Inc. and John P. Sutton pray for a writ of certiorari to the United States Court of Appeals for the Federal Circuit in this patent case.

OPINIONS BELOW

There are four opinions below that are related to awards of attorney fees. The first is by the district court in 2002 (A-1 to A-12) awarding all defense costs to be paid by Petitioners Phonometrics, Inc. ("Phonometrics") and its counsel John P. Sutton ("Sutton") "jointly and severally" (A-11).

The second is the opinion of the United States Court of Appeals for the Federal Circuit vacating the award by the district court and remanding to correct errors (A-13 to A-24).

The third is the district court opinion on remand (A-25 to A-34), again awarding all defense costs to be paid by Phonometrics and by Sutton.

The fourth is the judgment without opinion (A-35-36) affirming the district court decision.

JURISDICTION

This is a patent case brought in the district court under 28 U.S.C. §1338(a). Federal Circuit jurisdiction was under 28 U.S.C. §1295(a)(1). This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

28 U.S.C. §1927:

Counsel's liability for excessive costs

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

35 U.S.C. §285:
Attorney Fees

> The court in exceptional cases may award reasonable attorney fees to the prevailing party.

STATEMENT OF THE CASE

This is a petition seeking remand to the United States Court of Appeals for the Federal Circuit to set forth its reasons for affirming without opinion the decision of the United States District Court for the Southern District of Florida which contained no findings regarding "excess costs," based on a record of Sheraton time entries that showed no excess costs attributable to attorney misconduct.

The four opinions below fail to set forth any findings as to excess costs under 28 U.S.C. §1927 that can be reviewed by this Court. In its two opinions, the district court never specified which time entries of counsel for Sheraton were required because of unreasonable and vexatious conduct by counsel in multiplying the proceedings. There is no showing whatsoever of any specific excess costs. After the first award of attorney fees to Sheraton, the Federal Circuit vacated the award and directed the district court to specify excess costs. The district court refused to do so, and

Phonometrics appealed again. The Federal Circuit affirmed without opinion, even though the direct order to specify excess costs and fees was not obeyed. Petitioners seek a writ to direct the Federal Circuit to provide a reviewable opinion as to why it accepted the second award that failed to specify excess costs. This Court has nothing to review from the Federal Circuit, an intermediate court.

1. HISTORY OF THE AWARDS.

Appendix A is the May 5, 2002 award of attorney fees and costs to ITT Sheraton Corp. ("Sheraton") by the district court. It awarded $65,466.17 in fees and $8,081.42 in costs "jointly and severally" (A-11) against Petitioners Phonometrics and Sutton. Phonometrics was held liable under 35 U.S.C. §285 and Sutton was held liable under 28 U.S.C. § 1927 (A-2). Sheraton sought an award of $131,963.49 (A-3), but the district court cut that to $73,547.59 under both statutes. In analyzing the award, the district court began "by calculating the lodestar which is the product of the hours reasonably expended by counsel multiplied by a reasonable hourly rate" (A-5). The district court found that counsel for Sheraton "may have over-prepared" (A-6) in charging over $130,000 for a case resolved by a motion for summary judgment with only a single deposition (taken by Phonometrics, not Sheraton), but the court nevertheless found "a high number of hours expended to be reasonable" (A-6).

All of the defense costs found to have reasonably been borne by Sheraton were awarded against both Phonometrics and Sutton, even though 28 U.S.C. §1927 expressly states that only "excess costs" attributable to attorney misconduct may be awarded. The district court made no effort to identify any "excess costs" and awarded

the full amount of the award found to be reasonable against Phonometrics and Sutton.

Appendix B (A-13 to A-24) is the opinion on the appeal to the Federal Circuit from the award of Appendix A. The court of appeals found that the district court "made certain errors in its award" (A-14) and remanded the case for correcting the errors. Specifically, the Federal Circuit held that the "district court has not, however, specified which costs and fees are 'excess costs, expenses and attorneys' fees reasonably incurred because of conduct by counsel for Phonometrics that unreasonably and vexatiously multiplied the proceedings, as specified by §1927" (A-20, emphasis present). The court of appeals also vacated the "holding of joint and several liability by Phonometrics and its counsel for the aggregate award of fees and costs" (A-20). It concluded that the district court must "exclude those fees incurred by Sheraton in connection with" matters where it was not the prevailing party under 35 U.S.C. §285, and must "specify the amount of excess fees attributable to the conduct of counsel for Phonometrics, and [] specify the appropriate separate liability of Phonometrics and of its counsel" (A-24).

Appendix C (A-25 to A-34) is the district court's decision on remand. The court assumed that the Federal Circuit instruction to specify "which costs and fees are 'excess costs'" meant that it was directed to "specify counsel's conduct that unreasonably delayed the proceedings" (A-27). The district court made no effort to identify excess costs and awarded precisely the same amount of $59,177.79 to Sheraton to be individually paid by Phonometrics and Sutton. It did not use the term "jointly and severally" as in Appendix A (A-11), but it specified the same result that "[t]o the extent Phonometrics or Sutton pays a portion of the fee award, Sheraton may collect only the remaining portion from the nonpaying party" (A-33).

Instead of specifying the excess costs paid by Sheraton that were attributable to attorney misconduct, as the Federal Circuit ordered, the district court attempted to specify the conduct of Sutton that was improper, and not the acts of Sheraton's counsel that were caused by unreasonable and vexatious multiplying of proceedings (A-30-32). First, the district court held that a decision by the Federal Circuit that accused equipment made by Northern Telecom did not infringe the Phonometrics patent meant that "the accused Sheraton systems could not infringe the '463 patent." Sheraton never even alleged that it used Northern Telecom equipment. It used equipment made by competing manufacturers. The decision in *Phonometrics, Inc. v. Northern Telecom, Inc.*, 133 F.3d 1459 (Fed. Cir. 1998) could not possibly have determined that equipment made by competing manufacturers did or did not infringe the patent claims. Sheraton was not a party to that case and did not use the equipment at issue in that case. It therefore provided no basis for dismissing the Sheraton case "voluntarily" (A-31). It cannot possibly be improperly multiplying the proceedings to bring suit against the user of different equipment than that involved in the *Northern Telecom* case. More importantly, not a single time entry of counsel for Sheraton can be shown to have been caused by the failure to dismiss the case against Sheraton voluntarily in 1998.

Next, the district court cited its October 23, 1998 dismissal of the Sheraton case (A-31) as foreclosing "any possibility that Phonometrics claim could succeed." However, the dismissal of all cases, including the case against Sheraton, was appealed, reversed and remanded to the district court for trial. A successful appeal of the district court's erroneous order cannot be improper conduct justifying an award under §1927. The Federal Circuit held that there was nothing improper about appealing the

dismissal of the Sheraton case simply because Northern Telecom equipment did not infringe. An "experienced patent attorney" (A-31) knew that there is no *res judicata* effect from a prior holding of noninfringement using different equipment, unlike a holding of invalidity.

The district court opinion was affirmed by the Federal Circuit without opinion (Appendix D, A-35-36.)

2. AN EXAMINATION OF THE TIME ENTRIES SHOWS THAT THERE ARE NO EXCESS COSTS.

The district court has awarded attorney fees against Phonometrics in every case where a Defendant requested an award. The awards total millions of dollars, but the Federal Circuit on appeal has vacated nearly all of the awards. Sheraton has asked for, and received, awards from the district court three times, and only the present appeal was affirmed rather than vacated. No explanation was given by the Federal Circuit as to why the third award was affirmed without opinion after two previous awards to Sheraton were vacated. This third award was against both Sheraton and its counsel under different statutes. This Petition is limited to the award under 28 U.S.C. §1927, which expressly requires a showing of "excess costs" attributable to attorney misconduct.

Sheraton made no claim that any of the time entries represented "excess costs" caused by unreasonable and vexatious multiplying of proceedings. Instead, Sheraton made the claim for all of its defense costs except for appeals where Phonometrics prevailed under 35 U.S.C. §285, and made no effort to differentiate any of its attorney fees as "excess costs," rather than simply all routine defense costs.

3. ANALYSIS OF TIME ENTRIES.

The actual time entries submitted by Sheraton are in Appendix E (A-37 to A-69). Sheraton was represented by Rogers & Wells in January and February 1998, and by Kramer Levin Naftalis & Frankel LLP thereafter. Both firms are in New York City. A-37 and 38 are entries of the former firm for the time spent by an attorney for Rogers & Wells to review the decision in the case of *Northern Telecom*, the starting point for the district court's award. The district court found that the patent could not be enforced against any alleged infringer because summary judgment had been granted to Northern Telecom ("NTI" in A-37 and 38). The lawyer had spoken on the telephone (apparently more than once) with counsel for Northern Telecom, had reviewed the Federal Circuit decision in another Phonometrics case against Siemens, and had corresponded with the client and local counsel in Florida. None of these activities were caused by attorney misconduct, and could not possibly be characterized as the result of unreasonable and vexatious conduct by Sutton. Rather, reviewing prior cases was self-imposed, in that it was routine preparation of the case by counsel for Sheraton, and not a response to any delaying tactics by Sutton.

The March 25, 1999 bill (A-39 to A-41) relates to work done on a Sheraton motion for an award of attorney fees filed in 1999. That motion was granted by the district court and vacated by the Federal Circuit long before the four opinions below. The motion was voluntarily filed by Sheraton, and was not in response to any unreasonable or vexatious conduct by counsel for Phonometrics. Not only did several lawyers for the Kramer Levin firm work on the motion, there were numerous discussions with lawyers for other Defendants that had been sued by Phonometrics and

who sought awards of attorney fees. All of those awards were granted by the district court and vacated by the Federal Circuit.

The March 31, 1999 bill (A-42) shows further work on the Sheraton motion for an award of attorney fees. None of this work was responsive to any misconduct by counsel for Phonometrics.

The April 30, 1999 bill (A-43) also relates to briefing the attorney fee motion filed by Sheraton. That motion was granted, but vacated on appeal, so it could not have been caused by any act of Sutton.

A year later, in April 30, 2000 (A-44), Sheraton turned to work on two other motions that Sheraton contemplated filing, namely, a motion for Rule 11 violation and a motion for summary judgment. All of this work was voluntarily undertaken by Sheraton, and was not responsive to any unreasonable and vexatious conduct by Sutton.

The May 30, 2000 bill (A-45 to A-48) related to the motion for summary judgment as well as responding to the interrogatories and requests for documents served by Phonometrics. The motion was voluntarily filed by Sheraton, and the routine discovery requests were in no way dilatory, unreasonable or vexatious, and Sheraton never asserted that they were.

The June 30, 2000 bill (A-49-50) also relates to the discovery requests by Phonometrics. The requests were the first ones served and contained nothing that could be said to multiply the proceedings. These time entries show nothing improper by counsel for Phonometrics.

The July 31, 2000 bill (A-51) and the November 12, 2000 bill (A-52) show that the many lawyers working on the motion for summary judgment motion devoted six months to the motion that finally disposed of the case.

The December 31, 2000 bill (A-53 to A-55) shows that counsel for Sheraton, who also represented Westin Hotels in the case brought by Phonometrics, charged Sheraton for work done on the Westin case on November 7, 2000 and November 27, 2000. A new lawyer, Erica Klein, apparently replaced attorney Souras in about November 2000, and devoted the month between November 13 and December 13, 2000, studying the summary judgment motion file. Turnover in the Kramer Levin firm is an act attributable to counsel for Sheraton, and cannot be said to have been caused by any acts of attorney Sutton, counsel for Phonometrics.

The February 28, 2001 bill (A-56) related to the motion for summary judgment, which was supported by an affidavit of Oates, a Sheraton employee. Phonometrics took his deposition, and the sole entry on that bill is an analysis in preparation for the deposition by counsel for Sheraton. No attorney misconduct required that analysis to be made.

The March 23, 2001 bill (A-57) shows that the deposition apparently was taken on February 27, 2001, and three attorneys defended the Sheraton witness. Sutton did not force the three attorneys to attend the only deposition taken in the case over the course of seven years. While the thousands of dollars charged to Sheraton by these lawyers

may be "excessive" for a two hour deposition, it cannot fairly be characterized as "excess costs" under §1927 because it was not caused by Sutton's misconduct.

The April 30, 2001 bill (A-58) relates entirely to the Reply Brief on the Sheraton motion for summary judgment.

The May 31, 2001 bill (A-59) does not deal with any specific lawyer work, just "all outstanding matters" and "discussions." These cannot be "excess costs" attributable to attorney misconduct.

The June 29 and July 23, 2001 bills (A-60 to 63) seem to be only paralegal work on organizing the Sheraton files. None of this work was caused by attorney misconduct.

Sheraton refused to disclose precisely what equipment it used in its hotels, and Phonometrics was unable to prove that the equipment infringed without knowing who made the equipment. Phonometrics moved to compel disclosure of the makers of the equipment. The October 14, 2001 bill (A-64) relates to the opposition to the motion to compel. The motion was not filed for purposes of delay, but for disclosure of what Fed. R. Civ. P. 26(a)(1) requires to be disclosed "without awaiting a discovery request." This was not an "excess cost."

The November 21 and December 31, 2001 bills (A-65 and 66) were more discussions about summary judgment.

The January 30, 2002 bill (A-67) related to a motion to disqualify the district court judge for bias against Phonometrics. The motion was based on an appearance of impropriety on the part of the judge, and was not for purposes of delay or an unreasonable and vexatious multiplying of proceedings.

The February 28, 2002 bill (A-68) regarding the sanctions that Sheraton sought against Sutton under Rule 11. The same time entries cannot support both a Rule 11 sanction and a §1927 sanction for a double recovery.

The March 27, 2002 bill (A-69) relates to a motion for attorney fees, but it is not clear whether it was under Rule 11 or §1927. There is no showing that attorney misconduct led to the motion being filed.

The Federal Circuit should be required to specify which of these time entries supports a claim of "excess costs" under §1927.

ARGUMENT

A. THE AFFIRMANCE WITHOUT OPINION IS INCONSISTENT WITH THE DIRECTION TO SPECIFY EXCESS COSTS.

Supreme Court Rule 10(a) indicates that where a court of appeals has entered a decision in conflict with another court of appeals on the same important matter, it may be a reason for granting certiorari. Here, there is only one United States court of appeals that hears patent cases, so it is impossible to have a conflict among circuits. The conflict here is within the Federal Circuit, the sole court of appeals for patent cases. On April 29, 2003, the court vacated the district court holding under §1927 and remanded to "specify the amount of excess fees and costs resulting from any conduct by counsel for Phonometrics that unreasonably and vexatiously multiplied the proceedings in this case" (A-20).

The district court refused to specify any excess costs, as it was directed to do, and instead purported to "specify the vexatious conduct Attorney Sutton exhibited" (A-31). Sheraton made no effort to identify any specific excess costs, and simply submitted all defense costs less fees attributable to appeals where Phonometrics was the "prevailing party" under 35 U.S.C. §285. Section 285 does not have any requirement to specify "excess costs," so Sheraton simply ignored the statutory requirement of § 1927 and sought all defense costs, not just excess costs. The district court gave Sheraton everything that it asked for, as it had done previously for many Defendants. The Federal Circuit did not ask the district court to specify vexatious conduct; it asked the district court to specify excess costs. It was error for the district court to hold that a prior holding that Northern Telecom equipment did not infringe the patent meant that Sheraton equipment, which is not made by Northern Telecom, could not possibly infringe the patent. Continuing to litigate the case against Sheraton in these circumstances is not "vexatious conduct," as the district court held.

It was error for the Federal Circuit to affirm without opinion when its direct instructions to "specify the amount of excess fees and costs" were ignored. In the absence of any opinion, this court cannot determine whether there are any specific excess costs. The reasons for affirming should be stated.

One can only surmise that the Federal Circuit has decided that it will not hear any further appeals by Phonometrics. At the oral argument of the appeal that is the subject of this Petition, Judge Rader, the presiding judge on the panel, said that he had done a survey of Phonometrics cases, and came up with a total of twenty two appeals by Phonometrics. The implication is that the court has decided

not to hear any more Phonometrics appeals, regardless of merit.

This implication is supported by the extrajudicial threat made on behalf of the court by the President of the Federal Circuit Bar Association. The present Clerk of the Federal Circuit contacted his predecessor Clerk, George Hutchinson, regarding Sutton's conduct in Phonometrics appeals. Both Hutchinson and Sutton began at the Court of Customs and Patent Appeals in 1962, Hutchinson being groomed to become Clerk shortly thereafter, and Sutton as the first Law Clerk to J. Lindsay Almond, Jr., Associate Judge. Hutchinson became Clerk of the Court of Customs and Patent Appeals and later the Clerk of the Federal Circuit. Hutchinson is now Of Counsel to a prominent Washington, D.C. patent firm.

When the present Clerk of the Federal Circuit asked how the court could convey a message to attorney Sutton, Hutchinson responded that the man in the office next to his was the President of the Federal Circuit Bar Association. He arranged for the Bar Association lawyer to visit Sutton and personally deliver a nonspecific message to Sutton that his behavior was found objectionable by the court. The message was specific as to Phonometrics appeals, but not specific as to what the objections were. It is now clear that the Federal Circuit has, or some judges of the court have, decided that no further Phonometrics appeals will be considered.

No opinion was rendered below because there was merit to the appeal and the district court ignored the direct instruction to specify "excess costs" and did not do so. The refusal to consider the appeal on the merits simply because it is a Phonometrics appeal filed by Sutton is unjust. The supervisory power recited in this Court's Rule 10(a) is an appropriate means to direct the Federal Circuit to address the

merits of the appeal and provide an opinion that can be reviewed by this Court on certiorari. Extrajudicial threats from the Federal Circuit should not be condoned by this Court and should not be allowed to interfere with the administration of justice.

A remand to provide the reasons for affirming is appropriate. Neither Phonometrics nor Sutton has any evidence of bias or partiality by the Federal Circuit, although Phonometrics moved to disqualify the district court judge under 28 U.S.C. §455(a). The district judge denied the motion. Because the threat from the court via the Federal Circuit Bar Association officer was not specific as to source or as to the conduct objected to, no specific claim can be made of violation of the oath of any judge to "administer justice without respect to persons" under 28 U.S.C. §453. No claim will be made until an explanation of the reasons for affirming without opinion has been revealed. Supervision of a court making extrajudicial threats is appropriate.

B. THE LAW UNDER §1927 IS CLEAR.

The award against attorney Sutton is not warranted. Unlike 35 U.S.C. §285, the basis for the award against Phonometrics, §1927 is penal in nature, and must be strictly construed.

The standard of review for an award of attorney fees is an abuse of discretion. The award is left to the sound discretion of the district court, but it must be shown on the record that there is support for the award. Absent that, it is an abuse of discretion to make an unsupported award.

The black letter law stated by G. P. Joseph in *SANCTIONS The Federal Law of Litigation Abuse* (2000), §25(C) is:

The record must reflect the specific reasons for which a §1927 sanction is imposed and the method by which the award is calculated.

Joseph cites *Schwarz v. Folloder*, 767 F.2d 125, 133 (5th Cir. 1985) in support. "Although an award of attorney fees, like an award of costs, is committed to the discretion of the trial court and can only be reversed for an abuse of discretion, [citation omitted], the trial court must give reasons for its decisions regarding attorney's fees; otherwise, we cannot exercise meaningful review." The refusal of the Federal Circuit to give reasons for its decision prevents meaningful review by this Court.

The analysis used for Rule 11 attorney fee awards is similar to that used under §1927. In *Smith International, Inc. v. Texas Commerce Bank*, 844 F.2d 1193, 1201 (5th Cir. 1988), the court reversed and remanded awards of attorney fees under both Rule 11 and §1927 and concluded: "The same analysis prevents us from sustaining the award against attorney Burleson under section 1927" (footnote 5). The court "disagree[d] with [the district court's] determination that the law in this respect was so clear and well fixed that the plaintiff's legal theory was unreasonable as a matter of existing law and as a request for its modification or extension. We hold that the district court exceeded the scope of its discretion . . ." The court noted (844 F. 2d at 1197) the need for findings, quoting *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 883 (5th Cir. 1988)(en banc) that "such sanctions must be quantifiable with some precision," and said that reasoning is "equally applicable to section 1927." It was error in *Smith International* for the district court to award the defendant "its full litigation expenses." (at 1198). In the present case, the district court awarded Sheraton full litigation expenses, contrary to the

express instruction of the Federal Circuit to specify excess costs.

The district court held that "Northern Telecom foreclosed any possibility that Phonometrics' claim could succeed" (A-21). However, there is no issue preclusion from a prior holding of noninfringement. Each accused device must be considered on its own merits. Simply because Northern Telecom equipment does not infringe does not mean that Sheraton equipment does not infringe. *Del Mar Avionics v. Quinton Instrument Co.*, 836 F.2d 1320 (Fed. Cir. 1987); *Young Engineers, Inc. v. Int'l Trade Comm'n*, 721 F.2d 1305 (Fed. Cir. 1983).

Phonometrics was entitled to have a trial of the genuinely disputed issue of whether Sheraton equipment infringed. Infringement is a "question of fact, to be submitted to a jury." *Winans v. Denmead*, 15 How. 330, 338 (1854), quoted in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996).

It is not attorney misconduct to "continue[] to litigate the case" (A-31) where the patent has not been shown to be invalid. Infringement depends on the particular facts of each accused system, and *res judicata* does not apply to a prior holding of noninfringement, unlike a prior holding of invalidity. *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 33 (1971).

The excess costs under §1927 must be identified by the district court, but the court here did not do so. In *Braley v. Campbell*, 832 F.2d 1504,1513 (10th Cir. 1987)(en banc), the court held that when imposing sanctions under §1927, a court "must sufficiently express the basis for the sanctions imposed to identify the excess costs reasonably incurred by the parties to whom they will be due." "[S]pecific findings

are required for several reasons. . . . [T]he court must identify the extent of the multiplying resulting from the attorney's behavior and the costs arising therefrom. Second, because the person sanctioned is entitled to notice and an opportunity to be heard, the objectionable conduct must be identified sufficiently to make the opportunity to respond meaningful. Finally, the reasons for the decision must be in a form reviewable by the appellate courts."

Here, Sutton has been given no notice as to what conduct was objectionable. Nor has Sheraton indicated what costs arose from objectionable conduct or what the extent of the multiplying
was.

In *Insurance Benefit Administrators, Inc. v. Martin*, 871 F.2d 1354, 1361 (7th Cir. 1989), the court said: "The district court's failure to specify which conduct of [the attorney] violated [§1927] also merits remand because not every type of attorney misconduct is sanctionable." The court quoted *Matter of Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986) for the proposition that the sanctions awarded must "be quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority" (at 1362). Here, there is no finding quantifying "with some precision" the excess costs, and no itemization of the time entries as to the perceived misconduct.

Reynolds v. Humko Products, 756 F.2d 469, 473 (6th Cir. 1985) said that in awarding sanctions under § 1927, "[t]he courts have emphasized the need for findings in the record as well as notice and an opportunity to be heard, *E.g., Roadway Express Inc. v. Piper*, 447 U.S. 752 (1980); *Lewis v. Brown & Root Inc.*, 711 F.2d 1287, 1292 (5th Cir. 1983); *Durrett v. Jenkins Brickyard*, 678 F.2d 911, 919 (11th Cir.

1982); *Glass v. Pfeffer*, 657 F.2d 252, 257-58 (10th Cir. 1981)."

The conflict between the Federal Circuit opinion in Appendix B (A-13) and its lack of opinion in Appendix D (A-35) is the same as a conflict between circuits where there is only one circuit that can hear patent appeals. Moreover, the district court has "so far departed from the accepted and usual course of [§1927] judicial proceedings" and such departure has been sanctioned by the Federal Circuit. This conduct justifies the exercise of the Court's supervisory power under Rule 10(a).

CONCLUSION

The petition for writ of certiorari should be granted and the case remanded to the Federal Circuit to explain its reasons for affirming without opinion. "[T]he Federal Circuit is not a court of last resort" *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 97 (1993). In order to provide a meaningful review, an opinion explaining why it is appropriate for the district court to not specify Sheraton's "excess costs" under §1927.

Dated: October 20, 2004

Respectfully submitted,

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Attorney for Petitioner
PHONOMETRICS, INC.

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-6502-CIV-RYSKAMP

PHONOMETRICS, INC.,
a Florida Corporation,

Plaintiff,

v.

ITT SHERATON CORP.,

Defendant.
_____/

ORDER ON ATTORNEYS' FEES AND COSTS

AWARD

THIS CAUSE came before the Court upon this Court's March 22, 2002 Order Granting in Part and Denying in Part Defendant's Motion for Attorney's Fees Pursuant to 28, U.S.C. § 1927 and 35 U.S.C. § 285 **[DE 154]**. In its Motion for Attorneys' Fees Pursuant to 28 U.S.C. § 1927 and 35 U.S.C. § 285 **[DE 148]**, filed February 20, 2002,

Defendant requested attorneys' fees incurred throughout this litigation pursuant to both 28 U.S.C. § 1927 and 35 U.S.C. § 285. In the March 22, 2002 Order, this Court granted Defendant's motion to the extent that it requested attorneys' fees incurred after January 15, 1998. This Court awarded attorneys' fees and costs against the Plaintiff, pursuant to 35 U.S.C. § 285, and against the Plaintiff's counsel, pursuant to 28 U.S.C. § 1927. This Court declined to grant Defendant attorneys' fees and costs incurred prior to January 15, 1998.

In its motion for attorneys' fees, Defendant claimed attorneys' fees and costs incurred after January 15, 1998 in the amount of $100,946.31. The documentation of these requested fees and costs was inadequate and confusing. Thus, in an effort to provide clarification, this Court ordered Defendant to submit a statement "which clearly indicates the amount of attorneys' fees and costs expended since January 15, 1999." The Court ordered that in its statement Defendant "shall provide a listing of the total costs incurred,

descriptions for each type of costs, the total attorneys' fees incurred, the number of hours expended by each attorney working on the case (including local counsel), descriptions for the work done during these hours, and the hourly rate of each attorney working on the case." The Defendant submitted such a statement on March 28, 2002 [**DE 158**]. Plaintiff responded to the statement on April 10, 2002 [**DE 156**].

In Defendant's March 28, 2002 statement, lead counsel submitted an affidavit in which he stated that the attorneys fees and costs incurred after January 15, 1998 total $131,963.49. This amount is considerably larger than the $100,946.31 originally claimed to have accrued after January 15, 1998. Upon examination of the March 28, 2002 statement, it appears that the difference in requested amounts is generated by Defendant's current request for fees and costs expended after it submitted the motion for attorneys' fees on February 20, 2002. Such additional costs and

expenses were not contemplated by the Court when it entered its March 28, 2002 Order granting attorneys' fees and costs incurred after January 15, 1998. This Court, therefore, does not find that these newly expended fees and costs are to be awarded, and it restricts its review of fees and costs to those expended between January 15, 1998 and February 20, 2002.

No objection to the amount of fees and costs requested by Defendant has been lodged by Plaintiff or Plaintiff's counsel. In its original response to Defendant's motion for attorneys' fees, Plaintiff did not object to the amount of reasonableness of the fees and costs requested. In its April 10, 2002 response, Plaintiff and Plaintiff's counsel again did not object to the amount or reasonableness of the fees and costs requested by Defendant. Instead, Plaintiff and Plaintiff's counsel continued to argue that Defendant should not receive fees and costs. Such argument is moot at this point in the proceedings.

In determining the award of fees and costs, this Court must begin by calculating the lodestar which is the product of the hours reasonably expended by counsel multiplied by a reasonable hourly rate. Norman v. Housing Authority of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1998) (citing Hensley v. Eckerhart, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)). The Court may then consider whether this amount is to be adjusted for extraordinary results. Id. at 1302. Courts are also expected to use their knowledge and experience concerning reasonable and proper fees when making fee determinations. See Norman, 836 F.2d at 1303. The moving party bears the burden of submitting evidence supporting the fee award and "[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly." Hensley, 411 U.S. at 433. The time records should be detailed enough to enable a court to eliminate excessive, redundant, unnecessary or otherwise unreasonable expended hours. Id. at 437.

Upon review of the pertinent portions of the record, the Court finds the number of hours expended by Defendant's counsel between January 15, 1998 and February 20, 2002 to be reasonable. The number of hours expended appears high. Yet, a review of the billing records does not produce unusual time entries. Although counsel may have over-prepared, "this is understandable in light of today's environment." Executive 100, Inc. v. Martin Co., 739 F. Supp. 1521, 1523 (S.D. Fla. 1990). Furthermore, the risk of this litigation was high. Defendant's potential liability in terms of damages would dwarf the legal fees incurred. Given the length, complexity and seriousness of this litigation, however, this court finds a high number of hours expended to be reasonable.

The Court does not find the majority of the hourly rate charged by Defendant's counsel to be reasonable. Defendant requests fees reflecting hourly rates ranging between $130 for legal assistants to $550 for lead counsel.

Lead counsel did not submit any information regarding the experience of the attorneys or any affidavits of third parties confirming that the rates claimed are in accordance with the prevailing market rates charged in similar cases by attorney with comparable skills, reputations, and experience. See Norman v. Housing Authority of Montgomery, 836 F.2d 1292, 1999 (11th Cir. 1988) Lead counsel did submit tables entitled "Hourly Billing Rates by Practice and Location of Primary Place of Work" taken from the 1999 and 2001 American Intellectual Property Law Association's Economic Survey. This Court's knowledge coupled with the data taken from the tables submitted indicate that the billing rates for the attorneys, law clerks, and legal assistance working at both Rogers & Wells and Kramer Levin are unreasonably high. The billing rates for the attorneys at Katz Barron, however, are reasonable. To adjust the rates of the attorneys, law clerks, and legal assistants working at Rogers & Wells and Kramer Levin to reasonable levels, this Court adjusts the

rates to seventy-five percent of the rates originally claimed by Rogers & Wells and Kramer Levin.[1]

After the noted adjustment in hourly rates, the attorneys' fees incurred by Defendant between January 15, 1998 and February 20, 2002 by Rogers & Wells and Kramer Levin are as follows:

Attorney	Hours	Hourly Rate	Total Amount
Laughton	4.75	$251	$1,192.25
Coch	87.54	$330	$28,888.20
Abruzzese	48.35	$263	$12,716.05
Klein	14.55	$195	$2,837.25
Souras	13.66	$146	$1,994.36
Turko	3.6	$158	$568.80
Law Clerks	71.1	$120	$8,532

[1] Several attorneys' hourly rates are listed in ranges. When adjusting rates given in a range, the Court utilizes the lowest rate in the range. For example, Attorney Coch claimed hourly rates in the range of $440-550. Since the Court is not given information on which hours go with which rate, the Court can only assume the lowest rate of $440. Thus, the seventy-five percent adjustment is taken from the hourly rate of $440, and Attorney Coch's reasonable rate is $330.

Legal Assist.	37.02	$98	$3,627.96
			$60,356.87

The attorneys' fees expended by Katz Barron present difficulty for this Court. Although the Court finds the hourly rates of $210 for Attorney Allen and $190 for Attorney Auerbacher to be reasonable, there is confusion surrounding the calculation of the fees generated by these attorneys. According to the Court's calculations, the number of hours expended between January 15, 1998 and February 20, 2002 by Attorney Allen is 29.55 and the number expended by Attorney Auerbacher is .60. Utilizing the claimed hourly rate and the Court's calculation of hours expended, the total amount of fees expended by Katz Barron appears to be $6,319.50. However, Defendant claims 56.10 hours expended by Attorney Allen, and yet Defendant's calculations yield only $5,677 in Katz Barron attorneys' fees. Since Defendant's calculations do not make sense, it is

impossible for this Court to conclude how the Defendant determined the amount of fees requested for the work expended by Katz Barron. The documentation provided by Defendant is necessarily inadequate. To compensate for the inadequacies, the Court accepts the lower amount of $5,677 reduced by ten percent to $5,109.30 as the total fees requested for the work done by Katz Barron. The total attorneys' fees awarded to Defendant is therefore $65,466.17.

The Court ordered Defendant to clearly provide a listing of the total costs incurred and descriptions for each type of costs. Although Defendant provided the Court with the total costs requested, $11,950.95, Defendant did not provide clear descriptions of each type of cost. Instead Defendant left the Court to fish through the billing records to determine the make-up of these costs. In reviewing the billing records, the Court determined that costs in the amount of $2,432.09 were incurred after February 20, 2002. These

costs are not to be awarded. The Court also determined that the costs described as cab fares, in-house meals, and out-of-town travel are inadequately documented as the Court is unable to determine whether such costs were necessarily expended in defense of this case. Because of the inadequacies, the Court does not award the $1,437.44 listed for cab fares, in-house meals, and out-of-town travel. The total costs awarded to Defendant is therefore $8,081.42.

Accordingly, and upon review of the pertinent portions of the records, it is hereby

ORDERED AND ADJUDGED that attorneys' fees in the amount of $65,466.17 and costs in the amount of $8,081.42 shall be awarded to Defendant. Plaintiff and Plaintiff's counsel, John P. Sutton, are jointly and severally liable for these fees and costs. JUDGMENT of $65,466.17 in attorneys' fees and $8,081.42 is hereby entered for Defendant and against Plaintiff, for which let execution issue. JUDGMENT of $65,466.17 in attorneys' fees and

$8,081.42 is hereby entered for Defendant and against Plaintiff's counsel, John P. Sutton, for which let execution issue.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 5th day of May, 2002.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
Nicholas Coch, Esq.
John P. Sutton

APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public order. This disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-1417

PHONOMETRICS, INC.

Plaintiff-Appellant,

v.

ITT SHERATON CORP.,

Defendant-Appellee.

DECIDED: April 29, 2003

Before MICHEL, RADER, and PROST, Circuit Judges.

PROST, Circuit Judge.

Phonometrics, Inc. appeals from the order of the United States District Court for the Southern District of Florida granting-in-part and denying-in-part ITT Sheraton Corporation's ("Sheraton's") motion for attorney fees

pursuant to 28 U.S.C. § 1927 and 35 U.S.C. § 285. We have jurisdiction to consider this appeal under 28 U.S.C. § 1295(a)(1). Because the district court made certain errors in its award, we affirm-in-part and vacate-in-part the district court's order and remand this case for further proceedings consistent with this opinion.

The district court found that the maintenance of this lawsuit after January 15, 1998—the date we issued our opinion in Phonometrics, Inc. v. Northern Telecom, Inc., 133 F.3d 1459, 45 USPQ2d 1421 (Fed. Cir. 1998)—to be vexatious, unjustified and undertaken in bad faith. According to the district court, it was clear after we issued the claim construction in Northern Telecom that Sheraton did not infringe U.S. Patent No. 3,769,463 ("the '463 patent"). Thus, the district court concluded that

> Plaintiff's continued maintenance of this case after Northern Telecom has resulted in unjustified multiplication of proceedings. This unjustified, vexatious and bad faith maintenance of the lawsuit is deserving of an award of fees and costs pursuant to both 28 U.S.C. § 1927 and 35 U.S.C. § 285.

> Accordingly, this Court grants Defendant attorneys' fees and costs incurred after January 15, 1998, the date that the Federal Circuit issued its opinion in Northern Telecom. Both Plaintiff and Plaintiff's counsel are responsible for these fees and costs.

Phonometrics, Inc. v. ITT Sheraton Corp., No. 94-6502-CIV-RYSKAMP, slip op. at 8 (S.D. Fla. Mar. 22, 2002). The court subsequently awarded Sheraton attorney fees in the amount of $65,466.17 and costs in the amount of $8,081.42, holding Phonometrics and its counsel jointly and severally liable to Sheraton for these amounts. Phonometrics, Inc. v. ITT Sheraton Corp., No. 94-6502-CIV-RYSKAMP, slip op. at 7 (S.D. Fla. May 6, 2002).

I

Pursuant to 35 U.S.C. § 285, "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party."

> The determination of whether a case is exceptional and, thus, eligible for an award of attorney fees under § 285 is a two-process. First, the district court must determine whether a case is exceptional, a factual determination reviewed for clear error. After determining that a case is exceptional, the district

> court must determine whether attorney fees are appropriate, a determination that we review for an abuse of discretion. A district court abuses its discretion when its decision is based on clearly erroneous findings of fact, is based on erroneous interpretation of the law, or is clearly unreasonable, arbitrary of fanciful.

Cybor Corp. v. FAS Techs, Inc., 138 F.3d 1448, 1460, 46 USPQ2d 1169, 1178 (Fed. Cir. 1998) (en banc) (citations omitted). "The prevailing party may prove the existence of an exceptional case by showing: inequitable conduct before the PTO; litigation misconduct; vexatious, unjustified, and otherwise bad faith litigation; a frivolous suit or willful infringement." Epcon Gas Sys., Inc. v. Bauer Compressors, Inc., 279 F.3d 1022, 1034, 61 USPQ2d 1470, 1479 (Fed. Cir. 2002) (citing Hoffman-La Roche Inc. v. Invamed Inc., 213 F.3d 1359, 1365, 54 USPQ2d 1846, 1850 (Fed. Cir. 2000)). "Litigation misconduct and unprofessional behavior are relevant to the award of attorney fees, and may suffice, by themselves, to make a case exceptional." Epcon Gas, 279 F.3d at 1034, 61 USPQ2d at 1479 (citing Sensonics, Inc. v.

Aerosonic Corp., 81 F.3d 1566, 1574, 38 USPQ2d 1551, 1557-58 (Fed. Cir. 1996)). When "the patentee is manifestly unreasonable in assessing infringement, while continuing to assert infringement in court, an inference is proper of bad faith, whether grounded in or denominated wrongful intent, recklessness, or gross negligence." Eltech Sys., Corp. v. PPG Indus., 903 F.2d 805, 811, 14 USPQ2d 1965, 1970 (Fed. Cir. 1990).

The district court concluded that this case is exceptional because Phonometrics continued to litigate the case even after it knew that it could not prevail on the merits. This finding is not clearly erroneous. Since we issued the Northern Telecom opinion clarifying the construction of certain claim terms of the '463 patent, Phonometrics has been unable to articulate any plausible basis for how Sheraton accused systems meet the claim limitation of a "call cost register means, including a digital display, for providing a substantially instantaneous display of cumulative call cost

in dollars and cents." See '463 Patent, col. 8,, ll. 41-43. Phonometrics took no affirmative steps to end this litigation and instead proceeded to oppose a motion for summary judgment of noninfringement. Its arguments in opposition to summary judgment, both before the district court and on appeal before this court, attempt to reargue claim construction in spite of our precedential holding in Northern Telecom, and in spite of our explicit warning in Phonometrics, Inc. v. Choice Hotels International, Inc., 2001 U.S. App. LEXIS 23565 (Fed. Cir. 2001) not to relitigate issues of claim construction that had been previously decided. In light of these facts, the district court's determination that this case is exceptional is not clearly erroneous. We therefore affirm the district court's ruling that this case is an exceptional one under § 285.

II

Section 1927 addresses "[c]ounsel's liability for excessive costs." According to this statute:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S. C. § 1927 (2000). In reviewing a district court's award of attorney fees under § 1927, we apply the law of the regional circuit, in this case the Eleventh Circuit. See Baldwin Hardware Corp. v. Franksu Enter. Corp., 78 F.3d 550, 560-61 (Fed. Cir. 1996). The Eleventh Circuit reviews an award of attorney fees under § 1927 for an abuse of discretion. Id. at 561.

For the same reasons that we affirmed the district court's finding that this case is exceptional, we affirm the district court's determination that the proceedings in this case have been unduly multiplied, at least to some extent, by the maintenance of this lawsuit after January 15, 1998. By awarding fees under § 1927, the district court has attributed some responsibility for the maintenance of this lawsuit

directly to counsel for Phonometrics and we do not disagree with that determination. The district court has not, however, specified which costs and fees are "excess costs, expenses and attorneys' fees reasonably incurred because of" conduct by counsel for Phonometrics that unreasonably and vexatiously multiplied the proceedings, as specified by § 1927. We therefore vacate the award of fees and costs under § 1927 and remand to the district court to calculate and specify the amount of excess fees and costs resulting from any conduct by counsel for Phonometrics that unreasonably and vexatiously multiplied the proceedings in this case.

In addition, we vacate the district court's holding of joint and several liability by Phonometrics and its counsel for the aggregate award of fees and costs. Section 285 is a fee shifting statute that in exceptional cases may require the losing party to reimburse the prevailing party its attorney fees. Sheraton has provided us with no legal basis for entering a fee award against the losing party's attorney under

§ 285. Section 1927, on the other hand, is limited to an award of fees against an attorney. Sheraton has provided us with no legal basis for holding the attorney's client liable for fees under § 1927. Thus, Phonometrics is not liable for fees awarded under § 1927; it can only be liable for fees awarded under § 285. Counsel for Phonometrics is not liable for fees awarded under § 285; it can only be liable for excess fees awarded under § 1927.

III

Phonometrics argues that the district court erred by awarding fees prior to April 14, 2000, the date we vacated a previous award of attorney fees in appeal no. 00-1020. We reject this argument. Our decision to vacate the prior award of attorney fees was based on the fact that, at that time, Sheraton was not a prevailing party. We made no determination that Sheraton was forever precluded from receiving attorney fees.

Phonometrics also argues that Sheraton is not entitled to receive attorney fees incurred in connection with prior appeals to this court. In appeal no. 99-1130, Phonometrics successfully appealed the dismissal of its complaint on procedural rounds, leading us to remand the case back to the district court on April 12, 2000. Likewise, in appeal no. 00-1020, Phonometrics obtained a favorable outcome because we vacated the award of attorney fees against it. Sheraton has provided us with no legal authority for why it should receive attorney fees related to these appeals when Phonometrics was the prevailing party or how the district court had the authority to award fees related to proceedings before this court. We therefore conclude that the district court erred to the extent it awarded attorney fees incurred with respect to appeal nos. 99-1130 and 00-1020. For this reason, we vacate the award of attorney fees to Sheraton and remand for a recalculation of fees to exclude those fees

incurred in connection with appeal nos. 99-1130 and 00-1020.

However the district court chooses to recalculate these fees, we wish to make few observations to guide its decision. First, we note that Sheraton may have incurred reasonable attorney fees during the pendency of appeal nos. 99-1130 and 00-1020 for issues not related to these appeals. To the extent the district court awarded Sheraton any such fees, Sheraton is still entitled to receive them. We also note that Sheraton may have incurred fees prior to January 15, 1998, related to the preparation of its successful motion for summary judgment filed on December 8, 2000. However, because we agree with the district court's decision not to award fees incurred prior to the date of our Northern Telecom opinion, the district court should continue to base its award on only those fees incurred after January 15, 1998. Finally, we note that Phonometrics made only limited objections before the district court regarding the particular

fees requested by Sheraton. Phonometrics is precluded from using the remand as an opportunity to argue issues or make objections for the first time that could have been raised before. Both parties should limit their arguments on remand to the particular issues stated in this opinion.

CONCLUSION

For the foregoing reasons, we affirm the district court's decision to award fees and costs under 35 U.S.C. § 285 and 28 U.S.C. § 1927; however, we vacate the award for the reasons discussed in this opinion and remand for the district court to exclude those fees incurred by Sheraton in connection with appeal nos. 99-1030 and 00-1020, to specify the amount of excess fees attributable to the conduct of counsel for Phonometrics, and to specify the appropriate separate liability of Phonometrics and of its counsel.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-6502-CIV-RYSKAMP/VITUNAC

PHONOMETRICS, INC.,

Plaintiff,

v.

ITT SHERATON CORP.
a Delaware corporation,

Defendant.
_____/

AMENDED ORDER ON ATTORNEYS' FEES AND COSTS AWARD

THIS CAUSE comes before the Court pursuant to Defendant ITT Sheraton's Corp.'s ("Sheraton") Memorandum in Support of Attorney's Fees Incurred After January 15, 1998, filed July 31, 2003 [**DE 169**]. Plaintiff Phonometrics, Inc. ("Phonometrics") responded on August 19, 2003 [**DE 170**]. This matter is ripe for adjudication.

I. BACKGROUND

On May 2, 2003, the United States Court of Appeals for the Federal Circuit issued its Mandate affirming in part and vacating in part this Court's order granting in part and denying in part Sheraton's motion for attorneys' fees, filed May 5, 2002 [**DE 159**]. The Court awarded Sheraton $65,466.17 in attorneys' fees and $8,081.42 in costs pursuant to 35 U.S.C. § 285 and 28 U.S.C. § 1927, holding Phonometrics and its counsel jointly and severally liable for these amounts. The Court of Appeals directed this Court to recalculate its award of fees and costs because a portion of Sheraton's award stemmed from appeals in which Phonometrics prevailed. In appeal no. 99-1130, Phonometrics successfully appealed the dismissal of its complaint on procedural grounds. Additionally, in appeal no. 00-1020, Phonometrics obtained a favorable outcome because the Court of Appeals vacated the award of attorney fees against it. The Court of Appeals also directed this Court

to refashion its award to reflect the fact that 35 U.S.C. § 285 provides for awards against losing parties only and that 28 U.S.C. § 1927 provides for awards against counsel only. As sanctions pursuant to 28 U.S.C. § 1927 may only be imposed when counsel's conduct unreasonably and vexatiously results in prolonged proceedings, the Court of Appeals also requested that this Court specify counsel's conduct that unreasonably delayed the proceedings.

II. DISCUSSION

1. Reduction in Amount of the Fee Due to Appeals

The Court previously awarded Sheraton $65,466.17 in attorneys' fees and $8,081.42 in costs for a total award of $73,547.59. This award covered Sheraton's expenses incurred from January 15, 1998 through February 20, 2002, the date Sheraton moved for attorneys' fees.

Counsel for Sheraton has presented an amended verified statement of attorneys' fees and costs that adequately segregates the fees and costs incurred in appeals

no. 99-1130 and 00-1020 from the total award. The following individuals billed the following time for work done in connection with appeals nos. 99-1130 and 00-1020:

- Attorney Nicholas L. Coch billed a total of 27.72 hours at a rate of $330 per hour[1] for a total of $9147.60.
- Attorney Peter Abruzzese billed a total of 4.30 hours at a rate of $263 per hour for a total of $1130.90.
- Attorney Panayiota G. Souras billed a total of 13.66 hours[2] at a rate of $146 per hour for a total of $1,994.36.
- Legal Assistant Eleanore Banyan billed a total of .17 hours at a rate of $98.00 per hour for a total of $68.60.

Sheraton's attorneys and legal assistant billed a total of $12,341.46 in connection with appeals nos. 99-1130 and 00-1020. Sheraton's award of $65,466.17 in attorneys' fees is therefore reduced to $53,124.71. Sheraton's award of

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[1] The Court is applying the same adjusted billing rates it applied in the May 6, 2002 Order.

[2] As the Court included only 13.66 of Ms. Souras's 49.96 hours billed in connection with appeals nos. 99-1130 and/or

$8,081.42 in costs shall be reduced by $2,028.34 to $6053.08. Thus, Sheraton's aggregate award of $73,547.59 shall be reduced by $14,369.80 for a revised aggregate award of $59,177.79.

Counsel for Phonometrics, John P. Sutton, has objected to Sheraton's revised statement of fees on a number of grounds, all of which are baseless. First, Sutton objects to the January and February 1998 bills for $1018.04 and $595.52, respectively, for work performed by attorney Charles Laughton on the grounds that the expenses are unreasonable. The award of those fees is justified because they could not possibly be in connection with either appeal, as both appeals were filed after 1998. The amount of these fees is reasonable because in its May 6, 2002 Order, the Court reduced attorney Laughton's hourly rate from $335 to $251 per hour. Second, Sheraton parceled out its attorneys' fees for January, February and March 1999, specifically

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00-1020 time in its May 6 Order, the Court likewise includes

designating the expenses incurred in relation to the appeals. Sutton objects to Sheraton's piecemeal reductions on the grounds that the entirety of its January – March 1999 work was devoted to the district court motion for attorneys' fees that was granted but ultimately reversed. What Sutton overlooks, however, is that these expenses were incurred in the district court prior to his filing an appeal. As such, they cannot be said to stem from an appeal in which Phonometrics prevailed. Finally, Sutton claims that Sheraton's billing 26.75 hours for the defense of a February 2001 deposition is unreasonable. The Court rejects this argument, noting that its May 6, 2002 Order already awarded fees for this deposition and appropriately reduced the attorney's hourly rates, thereby addressing any question of reasonableness.

2. Specific Vexatious Conduct

The Court of appeals also requested that this Court

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only 13.66 hours in this amended award.

specify the vexatious conduct Attorney Sutton exhibited that warranted the imposition of the fees award pursuant to 28 U.S.C. § 1927. Both this Court and the Court of Appeals have found that after the January 15, 1998 decision of Phonometrics v. Northern Telecom, Inc., 133 F.3d 1459 (Fed. Cir. 1998), Phonometrics and Sutton knew that the accused Sheraton systems could not infringe the '463 patent. Nevertheless, Phonometrics and Sutton failed to dismiss the case voluntarily. This Court issued an Omnibus Order on October 23, 1998, dismissing the complaint on the basis that Northern Telecom foreclosed any possibility that Phonometrics' claim could succeed. Yet Phonometrics and Sutton continued to litigate the case. Sutton, an experienced patent attorney, knew or should have known that Phonometrics could not prevail on the merits after the Northern Telecom decision. Nevertheless, Sutton continued to litigate the case, appealing not only this Court's October 28, 1998 Order dismissing the complaint, but also each of

this Court's subsequent decisions. Because all of the fees and costs incurred by Sheraton after January 15, 1998, excluding fees and costs incurred in appeals nos. 99-1130 and 0-1020, are directly attributable to counsel's continued litigation of its claims in the face of notice that Phonometrics could not possibly prevail, the award of fees and costs to Sheraton pursuant to 28 U.S.C. § 1927 is warranted.

3. Joint and Several Liability

Whereas 35 U.S.C. § 285 allows for imposition of fees only against parties, and whereas 28 U.S.C. § 1927 allows for imposition of fees only against counsel, the Court finds that both Phonometrics and Attorney Sutton shall be individually liable for the total revised award of $59,177.79. Phonometrics shall be individually liable for this amount under 35 U.S.C. § 285 because this matter became "exceptional" in light of its continued litigation after the Northern Telecom decision. Attorney Sutton shall be individually liable for the same amount under 28 U.S.C. §

1927 given his dogged prosecution of this matter despite clear notice that success on the merits was impossible. While Phonometrics and Sutton are individually liable for the $59,177.79 award, Sheraton shall not be allowed the windfall of a double recovery. To the extent that Phonometrics or Sutton pays a portion of the fee award, Sheraton may collect only the remaining portion from the nonpaying party.

III. CONCLUSION

The Court, being fully advised, and having considered the pertinent portions of the record, hereby

ORDERS AND ADJUDGES that attorneys' fees in the amount of $53,124.71 and costs in the amount of $6,053.08 shall be awarded to Defendant Sheraton. Plaintiff and Plaintiff's counsel, John P. Sutton, shall be individually liable for the total award of $59,177.79. JUDGMENT of $53,124.71 in attorneys' fees and $6,053.08 in costs is hereby entered for Defendant Sheraton and against Plaintiff

Phonometrics and Plaintiff's counsel John P. Sutton. Let execution issue forthwith.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 15th day of October, 2003.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
Nicholas Coch, Esq.
John P. Sutton, Esq.

APPENDIX D

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public order.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

04-1106

PHONOMETRICS, INC.

Plaintiff-Appellant,

v.

ITT SHERATON CORP.,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Florida

IN CASE NO(S). 94-CV-6502

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED:

AFFIRMED. See Fed. Cir. R. 36.

Per Curiam (RADER, GAJARSA, and PROST, Circuit Judges).

ENTERED BY ORDER OF THE COURT.

DATED: JUL 23, 2004

Jan Horbaly, Clerk

ISSUED AS A MANDATE: AUG 13, 2004

APPENDIX E

Rogers & Wells
Peter A. Abruzzese, Esq.
ITT Corporation
1330 Avenue of the Americas
New York, NY 10019

Re: Phonometrics, Inc.

FOR PROFESIONAL SERVICES RENDERED AND DISBURSEMENTS RECORDED for the month of January, 1998

Description of Services

Telephone conferences with NTI attorney; review of CAFC Opinion in NTI appeal and correspondence with client regarding same; review of CAFC decision in Siemens appeal and correspondence with client regarding same.

Attorney	Hours	Rate
Laughton II, Charles. J.	3.00	$335.00

TOTAL FEES $1,005.00

Disbursements
Duplicating and other miscellaneous charges 13.04

TOTAL DISBURSEMENTS $13.04

TOTAL THIS INVOICE $1,018.04

Rogers & Wells
Peter A. Abruzzese, Esq.
ITT Corporation
1330 Avenue of the Americas
New York, NY 10019

Re: Phonometrics, Inc.

FOR PROFESIONAL SERVICES RENDERED AND DISBURSEMENTS RECORDED for the month of February, 1998

Description of Services

Review of final Federal Circuit opinion; correspondence with local counsel regarding case status and CAFC opinions.

Attorney	Hours	Rate
Laughton II, Charles. J.	1.75	$335.00

TOTAL FEES $586.25

Disbursements
Duplicating and other miscellaneous charges 9.27

TOTAL DISBURSEMENTS $9.27

TOTAL THIS INVOICE $595.52

ITT CORPORATION March 25, 1999

DATE PERSON	DESCRIPTION	AMOUNT
01/05/99 COCH	Review of facsimiles from Jill Berman of Berman, Wolfe & Rennert regarding Review and Recommendation of the Court with respect to the Phonometrics v. Northern Telecom case	880.00
01/06/99 COCH	Telephone conference with Mr. Peter Abruzzese regarding Phonometrics case; work on preparation of motion	880.00
01/08/99 COCH	Telephone conference with Mr. Bernard Allen regarding Phonometrics case and telephone conference with Mr. Abruzzese regarding same	132.00
0/1/11/99 COCH	Work on motion with fees; conference with Yiota Souras regarding filing of Notice of Appearance	880.00
01/11/99 COCH	Telephone conference with Mr. Craig Reilly regarding Phonometrics case; review of files and conference with Yiota Souras regarding	

ITT CORPORATION March 25, 1999

DATE PERSON	DESCRIPTION	AMOUNT
	legal research	1,100.00
01/12/99 COCH	Telephone conference with Mr. Richard Lehrer regarding Phonometrics; work on motion for attorney's fees	1,320.00
01/20/99 COCH	Review of Notice of Appearance received from attorney for Medistrust Corporation, Donald S. Showalter, regarding Phonometrics case	132.00
01/26/99 COCH	Conferences with Yiota Souras regarding filing of motion for attorney's fees and review of affidavits, etc.	660.00
01/15/99 SOURAS	Compilation of Rogers & Wells invoices re: Phonometrics litigation; initial calculation of amounts billed.	448.00
01/21/99 SOURAS	Completion of draft of motion for attorneys fees for N. Coch; partial assembly of bills/time records to be attached as exhibits to same	880.00
1/22/99 SOURAS	Additional compilation/ calculation of bills to ITT Sheraton re: Phonometrics	

ITT CORPORATION March 25, 1999

DATE PERSON	DESCRIPTION	AMOUNT
	litigation	256.00
01/25/99 SOURAS	Discussion with N. Coch re: draft Motion for Attorneys fees; completion of compilation of all bills to ITT Sheraton re: Phonometrics litigation; calculation of all attorneys fees from available bills; draft Coch and Allen declarations in support of motion; revisions to draft motion	1,120.00
01/26/99 SOURAS	Completion of assembly of exhibits to motion for Attorneys Fees and distribution of same to B. Allen for filing with completed brief	288.00
01/27/99 SOURAS	Discussion with B. Allen re: revisions to and filing of Motion for Attorneys fees; revisions to brief and exhibit sets; finalization of all documents and federal express to B. Allen for filing and serving on January 28	608.00
01/28/99 SOURAS	Discussion with B. Allen re: filing of Motion for Attorneys Fees service of same on J. Sutton	128.00

ITT CORPORATION March 31, 1999

DATE PERSON	DESCRIPTION	AMOUNT
02/22/99 COCH	Preparation for and conference with Peter Abruzzese and Yiota Souras regarding Phonometrics case	220.00
02/18/99 SOURAS	Review of Phonometrics Opposition papers	128.00
02/22/99 SOURAS	Discussion of N. Coch and P. Abruzzese re: draft reply to Phonometrics' Opposition to ITT Sheraton's motion for Attorney fees; calculating reply date; discussion with B. Allen (local counsel) re: obtaining extension for Reply	192.00
02/25/99 SOURAS	Drafting Reply to Phonometrics' Opposition to ITT's Motion for Attorneys fees	480.00
02/26/99 SOURAS	Drafting Reply to Phonometrics' Opposition to ITT's Motion for Attorneys fees	320.00
02/27/99 SOURAS	Completion of drafting Reply to Phonometrics' Opposition to ITT Sheraton's Motion for Attorney fees	800.00

ITT CORPORATION APRIL 30, 1999

DATE PERSON	DESCRIPTION	AMOUNT
02/22/99 ABRUZZESE	Discussion with N. Coch re: draft reply to Phonometrics' Opposition to ITT Sheraton's motion for Attn fees	175.00
03/29/99 COCH	Review of Phonometrics brief and conference with Yiota Souras regarding legal research	660.00
03/01/99 SOURAS	Completion of draft of ITT's Reply to Phonometrics' Opposition to ITT's Motion for Attorneys' Fees, and copy of same to N. Coch	400.00
03/03/99 SOURAS	Discussion with N. Coch re: draft ITT Reply Brief and revisions to same for N. Coch's review	320.00
03/04/99 SOURAS	Final revisions to ITT Reply brief; discussion with N. Coch re: same; fedex of same to B. Allen for filing with court on March 5	448.00

SHERATON APRIL 30, 2000

DATE PERSON	DESCRIPTION	AMOUNT
03/21/00 COCH	Work re Phonometrics; Memo to Yiota Souras and Peter Abruzzese re same	940.00
03/21/00 SOURAS	Initial review of summary judgment motions in related cases; completion of draft of second Rule 11 letter to J. Sutton and draft to N. Coch for his review	351.00
03/22/00 SOURAS	Draft Oates declaration; initial drafting of ITT Sheraton summary judgment motion; ordering related documents from Managing Clerk's Office for review	312.00
03/27/00 SOURAS	Finalization of Rule 11 letter to J. Sutton for N. Coch and distribution of same	97.50

ITT CORPORATION		May 30, 2000
DATE		
PERSON	**DESCRIPTION**	**AMOUNT**
04/06/00		
SOURAS	Discussion with N. Coch re: status of drafting summary judgment and newly issued Rule 11 decision	39.00
04/08/00		
SOURAS	Research in connection with Phonometrics' summary judgment brief and draft of same for N. Coch's review	546.00
04/10/00		
SOURAS	Completion of draft of summary judgment brief for N. Coch's review	1,326.00
04/11/00		
SOURAS	Drafting summary judgment motion; brief in support of same; and Oates affidavit	1,345.50
04/12/00		
SOURAS	Completion of draft of summary judgment brief; motion; and Oates affidavit for N. Coch's review	916.00
04/14/00		
COCH	Work on summary judgment motion; Telephone discussions and office conference with Yiota Souras re Phono-metrics	1,410.00
04/14/00		
SOURAS	Compilation of documents relating to draft summary	

ITT CORPORATION		May 30, 2000
DATE		
PERSON	**DESCRIPTION**	**AMOUNT**
	judgment motion per N. Coch's request	136.50
04/17/00		
COCH	Work on motion; Review of interrogatory requests and admissions	940.00
04/17/00		
ABRUZZESE	Review of Court of Appeals decision in connection with Phonometrics v. Westin Hotel Patent Infringement litigation related to accounting system in hotels. Participation in preparation of motion for summary judgement	750.00
04/18/00		
SOURAS	Revisions to draft summary judgment motion and copy to N. Coch for his review	292.50
04/19/00		
COCH	Office discussions with Yiota Souras	141.00
04/19/00		
SOURAS	Discussion with N. Coch re: revisions to Oates Affidavit and drafting revised Affidavit; review of revised summary judgment brief and revisions to same; collection of revised brief and affidavit drafts and materials in support of same for N. Coch's review	819.00

ITT CORPORATION May 30, 2000

DATE PERSON	DESCRIPTION	AMOUNT
04/20/00 COCH	Office discussions with Yiota Souras; Review of documents	470.00
04/20/00 SOURAS	Completion of collection of materials for N. Coch's review with drafts of ITT Sheraton's summary judgment motion and Oates affidavit	175.00
04/22/00 COCH	Work on review and revisions on summary judgment motions	940.00
04/24/00 SOURAS	Revisions to Sheraton summary judgment brief and Oates supporting affidavit and discussion with N. Coch and P. Abruzzese re: same; email to B. Oates re: draft affidavit in support of same	253.00
04/25/00 SOURAS	Email to B. Oates of draft affidavit for his review; discussion with P. Abruzzese and N. Coch re: status of summary judgment draft and discovery requests; phone message to J. Berman regarding discovery responses and summary judgment motion to be filed on behalf of ITT	

ITT CORPORATION May 30, 2000

DATE PERSON	DESCRIPTION	AMOUNT
	Sheraton	175.50
04/26/00 SOURAS	Initial drafting of discovery responses for ITT Sheraton	273.00
04/27/00 COCH	Preparation for and meeting with Yiota Souras re Phonometrics re answers to interrogators and admissions	940.00
04/27/00 SOURAS	Meeting with N. Coch regarding ITT Sheraton's response to Phonometrics' discovery requests; finalization of draft of discovery responses	507.00
04/28/00 COCH	Review response to interrogatories and response to request for admissions; E-mail to Bill Oates re same	940.00

ITT CORPORATION		June 30, 2000
DATE		
PERSON	**DESCRIPTION**	**AMOUNT**
05/03/00		
SOURAS	Review of letters from J. Berman re: discovery responses and discussion with N. Coch re: same	97.50
05/04/00		
SOURAS	Phone discussion with J. Berman's office regarding pending responses to Phonometrics' discovery requests	78.00
05/05/00		
COCH	Preparation for and office discussions with Yiota Souras re Phonometrics	470.00
05/05/00		
SOURAS	Discussions with N. Coch re: discovery responses to be filed Monday May 8; discussions with B. Oates and co-counsel re: same	175.00
05/08/00		
SOURAS	Discussion with B. Oates re: his final review and comments in connection with draft discovery responses; discussion with P. Abruzzese re: same; finalization of ITT Sheraton's discovery responses; serving discovery responses on J. Sutton and copies to J. Berman for her review	468.00

ITT CORPORATION June 30, 2000

DATE PERSON	DESCRIPTION	AMOUNT
05/08/00		
ABRUZZESE	Phonometrics v. Starwood Patent Infringement Litigation. Preparation of answers to interrogatories served by Phonometrics by Sheraton. Coordination and discussion with Bill Oates of Sheraton in preparation of answers	375.00
05/09/00		
SOURAS	Discussion with P. Abruzzese re: Court's Order re: parties to split expenses relating to joint appendix and J. Berman's letter inquiry re: same; fax to J. Berman re: same	78.00
05/09/00		
ABRUZZESE	Phonometrics v. Starwood Patent Infringement Litigation. Preparation of answers to interrogatories served by Phonometrics by Sheraton. Coordination and discussion with Bill Oates of Sheraton in preparation of answers	562.50
05/12/00		
COCH	Brief office discussions with Yiota Souras	141.00
05/19/00		
SOURAS	Draft status letter regarding pending Phonometrics litigation	273.00

ITT CORPORATION July 31, 2000

DATE PERSON	DESCRIPTION	AMOUNT
06/16/00 SOURAS	Phone message for B. Oates regarding affidavit in support of summary judgment motion to be filed against Phonometrics	58.50

ITT CORPORATION November 12, 2000

DATE PERSON	DESCRIPTION	AMOUNT
10/11/00 ABRUZZESE	Preparation of a proposed affidavit from Bill Oates in support of a Motions for Summary Judgment	562.50

ITT CORPORATION December 31, 2000

DATE / PERSON	DESCRIPTION	AMOUNT
11/07/00		
ABRUZZESE	Preparation of motion for summary judgment in the Phonometrics v Sheraton and Westin patent infringement litigation	375.00
11/27/00		
ABRUZZESE	Review and analysis of 30(b)(6) request for depositions by defendants in the Phonometrics v. Sheraton and Westin patent infringement litigation. Discussions with Jill Berman, Paul Lawrence of Preston Gates law firm. Preparation of letters to plaintiff's attorney. Discussion with Nick Coch.	937.50
12/22/00		
ABRUZZESE	Phonometrics-Review and analysis of pleadings filed for Phonometrics in opposition to our motion for Summary Judgment	937.50
12/04/00		
COCH	Meeting with E. Klein regarding Summary Judgment Motion	329.00
12/21/00		
COCH	File Notice of Presentation or Waiver of Oral Argument	329.00
11/13/00		
KLEIN	Study file; call to N. Coch re: summary judgment motion	

ITT CORPORATION		December 31, 2000
DATE		
PERSON	**DESCRIPTION**	**AMOUNT**
	exhibits	26.00
11/14/00		
KLEIN	Study file and FRCP 56 re: deadline for summary judgment motion; message to N. Coch re: same	78.00
12/04/00		
KLEIN	Study summary judgment motion; check citations re: same; prepare exhibits re: same; calls to local counsel re: same	546.00
12/05/00		
KLEIN	Finalize Memorandum; calls and letter to local counsel re: same	234.00
12/06/00		
KLEIN	Discussions with local counsel re: form Order; study Rules of Federal Procedure re: same; revise summary judgment motion; discussion with N. Coch re: same; letter to local counsel re: same	156.00
12/11/00		
KLEIN	Discussion with N. Coch re: filing; study files re: same; calls to local counsel re: same	156.00
12/12/00		
KLEIN	Discussions with local counsel re Notice of Motion; study files re: same; call to N. Coch re: same	130.00

ITT CORPORATION December 31, 2000

DATE PERSON	DESCRIPTION	AMOUNT
12/13/00 KLEIN	Discussion with local counsel re: Motion for Summary Judgment; discussion with N. Coch re: same; revise Motion for Joinder	130.00

ITT CORPORATION February 28, 2001

DATE PERSON	DESCRIPTION	AMOUNT
01/11/01 ABRUZZESE	Analysis and memorandum re Bill Oates deposition	425.00

ITT CORPORATION March 23, 2001

DATE / PERSON	DESCRIPTION	AMOUNT
02/20/01		
ABRUZZESE	Review of litigation history and responses to Interrogatories in preparation of the deposition of Bill Oates	637.50
02/26/01		
ABRUZZESE	Meeting with Bill Oates to prepare for deposition in the Phonometrics v. ITT Sheraton litigation. Preparation of documents in connection therewith.	2,550.00
02/27/01		
ABRUZZESE	Deposition of Bill Oates in the Phonometrics v. Sheraton litigation. Deposition taken by John Sutton representing the plaintiff and defended by Nick Coch and Peter Abruzzese	1,700.00
02/05/01		
KLEIN	Discussion P. Abruzzese re: litigation report; study file and draft report re: same	392.00
02/20/01		
KLEIN	Study files re: documents to be used for deposition preparation of W. Oates; discussions P. Abruzzese, N. Coch re: same	364.00
02/26/01		
KLEIN	Study documents prepared for deposition of William Oates; discussion P. Abruzzese re: same	364.00
02/27/01	Prepare for and attend depo-	
KLEIN	sition of William Oates	490.00

ITT CORPORATION April 30, 2001

DATE PERSON	DESCRIPTION	AMOUNT
03/21/01		
ABRUZZESE	Preparation of a response to the opposition filed by Phonometrics to our Motion for Summary Judgment	425.00
03/13/01		
ABRUZZESE	Preparation of a response to the opposition filed by Phonometrics to our Motion for Summary Judgment	637.50
03/13/01		
COCH	Work on reply brief	1,575.00
03/14/01		
COCH	Work on reply brief	1,050.00
03/15/01		
COCH	Work on reply brief	1,732.50
03/21/01		
COCH	Conference with P. Abruzzese	525.00

ITT CORPORATION May 31, 2001

DATE PERSON	DESCRIPTION	AMOUNT
04/03/01 KLEIN	Work on Phonometrics v. Sheraton re: all outstanding matters	112.00
04/12/01 KLEIN	Work on Phonometrics v. Sheraton; discussions J. Lopez, K. Hamanaka re: same; discussion P. Abruzzese re complaints	224.00
04/19/01 KLEIN	Discussion J. Lopez re: organization of files; review files re: same	112.00
04/20/01 KLEIN	Study files; discussion K. Hamanaka re: organization of same	112.00
04/20/01 HAMANAKA	Go through documents in order to categorize and file them in more organized manner, on Erica Klein, Esq.'s request	210.00

ITT CORPORATION June 29, 2001

DATE PERSON	DESCRIPTION	AMOUNT
05/09/01 HAMANAKA	File in the Litigation binder the litigation documents in 1999 and some of 2000, tab numbers 55 through 69, and record on its index accordingly. File in the Correspondence binder communications found varied in the litigation documents and other types of documents to their appropriate files.	182.00
05/10/01 HAMANAKA	File in the Litigation binder the litigation documents some of 2000, tab numbers 70 through 81, and record on its index accordingly. File in the Correspondence binder communications found varied in the litigation documents and other types of documents to their appropriate files.	210.00
05/17/01 HAMANAKA	Continue to file in the Litigation binder the litigation documents. Update the index accordingly. File in the Correspondence binder communications found varied in the litigation documents	

ITT CORPORATION June 29, 2001

DATE PERSON	DESCRIPTION	AMOUNT
	and other types of documents to their appropriate files. Create labels for redwells containing litigation documents, correspondence documents, research materials, and drafts, and organize them in file cabinets.	210.00

ITT CORPORATION July 23, 2001

DATE PERSON	DESCRIPTION	AMOUNT
06/01/01 HAMANAKA	Continue to file in the Litigation binder the litigation documents. Update the index accordingly. File in the Correspondence binder communications found varied in the litigation documents and other types of document to their appropriate files	174.21
06/04/01 HAMANAKA	Continue to file in the Litigation binder the litigation documents. Update the index accordingly. File in the Correspondence binder communications found varied in the litigation documents and other types of document to their appropriate files	149.32
06/05/01 HAMANAKA	Continue and complete filing in the Litigation binder the litigation documents. Update the index accordingly. File in the Correspondence binder communications found	

ITT CORPORATION July 23, 2001

DATE PERSON	DESCRIPTION	AMOUNT
	varied in the litigation documents and other types of document to their appropriate files. Discuss with Erica Klein, Esq. about the complete index and files as to where to store them.	174.21
06/07/01 HAMANAKA	Complete File Transmittal Form for each redwell, file them with Records and send them to off-site storage, where the files are to be kept until the case becomes more active. Create index for all files filed in Records	149.32
06/27/01 HAMANAKA	Print out litigation binder index	14.94

ITT CORPORATION October 15, 2001

DATE PERSON	DESCRIPTION	AMOUNT
09/05/01 ABRUZZESE	Preparation of opposition motion on behalf of Sheraton against motion to compel filed by Phonometrics	1,062.50
09/06/01 ABRUZZESE	Preparation of a memo in opposition to a Motion to Compel discovery filed by Phonometrics. Research regarding same	722.50

ITT CORPORATION November 21, 2001

DATE PERSON	DESCRIPTION	AMOUNT
10/12/01 ABRUZZESE	Phonometrics-Sheraton Motion for Summary Judgment	637.50
10/18/01 COCH	Meeting with P. Abruzzese	525.00
10/18/01 ABRUZZESE	Review and advice to Starwood regarding the CAFC Decision in the Phonometrics case. Discussions with local counsel on filing motions to conclude case and obtain award of sanctions.	637.50
10/24/01 HAMANAKA	Retrieve files from the off-site storage. Update files	490.00

ITT CORPORATION December 31, 2001

DATE PERSON	DESCRIPTION	AMOUNT
11/13/01 ABRUZZESE	Preparation of Motion for Summary Judgment in the Phonometrics case	425.00
11/14/01 ABRUZZESE	Correspondence relating to the Order to Show Cause and our Motion filed on behalf of Sheraton requesting the Court to set a hearing for our Motion for Summary Judgment of Non-Infringement, and for Sanctions under Rule 11	212.50
11/13/01 HAMANAKA	Work on documents in preparation for a motion paper to be filed	140.00
11/16/01 HAMANAKA	Update correspondence files, litigation binders and its index and the master index for all files	105.00

ITT CORPORATION January 30, 2002

DATE PERSON	DESCRIPTION	AMOUNT
12/10/01		
ABRUZZESE	Work on response on Motion to Dismiss the Judge for prejudice in the Phonometrics v. Sheraton and Westin case	637.50
12/13/01		
ABRUZZESE	Preparation of Opposition	637.50
12/14/01		
ABRUZZESE	Work on response on motion to disqualify	637.50

ITT CORPORATION February 28, 2002

DATE PERSON	DESCRIPTION	AMOUNT
01/03/02 HAMANAKA	Update files. (Correspondence Binder and Litigation Binder)	208.00
01/15/02 HAMANAKA	Update Litigation Binder, its index and Correspondence Binder. Locate and photocopy documents for Nicholas Coch, Esq.	464.00
01/15/02 ABRUZZESE	Review of U.S. District Court decision in the Phonometrics v. Sheraton case. Analysis of decision regarding sanctions	364.00
01/16/02 HAMANAKA	Update Litigation Binder, its index and Correspondence Binder	144.00
01/17/02 HAMANAKA	Locate and copy various documents for Nicholas Coch, Esq.	288.00
01/17/02 TURKO	Research for N. Coch on procedural requirements for filing motion for sanctions under FRCP 11(c)(1)(A)	840.00
01/22/02 HAMANAKA	Update litigation binder and its index	240.00

ITT CORPORATION March 27, 2002

DATE PERSON	DESCRIPTION	AMOUNT
02/11/02		
ABRUZZESE	Compilation of attorney fees and invoice for motion for reimbursement of attorney fees. Assist in preparation of motion for sanctions and attorney fees	1,137.50
02/12/02		
ABRUZZESE	Preparation of Motion for Attorney Fees in the Phonometrics v. Sheraton litigation	910.00
02/27/02		
ABRUZZESE	Review of Motion for Reimbursement of Attorney Fees and Sanctions. Discussions with Nick Coch regarding strategy. Correspondence relating thereto	455.00
02/12/02		
COCH	Work on Motion for Attorney's Fees	1,237.50
02/13/02		
COCH	Work on Motion for Attorney's Fees	1,375.00
02/25/02		
COCH	Telephone conference with Mr. Sutton; prepare certification	275.00